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In the Supreme Court of the United States

OCTOBER TERM, 1968

BERNARD J. CHUBET, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and others were convicted in the United States District Court for the Eastern District of Missouri (I R. 15; Tr. 1312-1314) of conspiracy to sell large quantities of amphetamine pills (Count I) and various substantive offenses (Counts II through XI) (see Pet. 3-5). He was sentenced to imprisonment for two years. The conviction was affirmed by the court of appeals on August 11, 1969, in an opinion reported at 414 F.2d 1022 (Pet. App. 1-7). The petition for a writ of certiorari, filed on January 10, 1970, is substantially out of time under Rule 22-2 of

the Rules of this Court. In any event, petitioner presents no issue of substance.

The evidence for the government, so far as here material, showed that Elliott, an agent for the Food and Drug Administration, was introduced to defendant Kauffmann by an informant named Miller (Tr. 48). Kauffmann was the owner of a company which was licensed to handle drugs, and explained to the agents that he would purchase drugs and have the records show that they were shipped to Formosa through New York City (Tr. 51-52).

On February 1, 1967, Elliott, with Miller present, bought 50,000 amphetamine pills from Kauffmann for $750. These were part of a larger shipment which Kauffmann had in his possession (Tr. 52-54). On February 5, Elliott met petitioner Chubet and one Chang at Kauffmann's home. Elliott told them that he understood they were the men who were setting up the records for overseas shipment, and petitioner replied, "That's right" (Tr. 59). On February 22, Elliott had a conversation with petitioner and Kauffmann, at which Miller was present (Tr. 61). Petitioner said he had brought up the records to show the shipment of tablets to Formosa by way of New York (Tr. 62). Petitioner referred to difficulties he and Kauffmann had had in making a delivery at Blue Springs, Missouri, the prior day and talked of making a delivery at Columbia, Missouri (*ibid.*). There was evidence by agents who made these purchases in Missouri. They paid the money to Kauffmann who was accompanied by petitioner (Tr. 206-207, 272-277; see Tr. 304-306, 320-321).

There was also testimony that on March 13 Kauffmann arranged for a bill of lading on two drums sent by truck from Crystal City (Tr. 536-541). When opened at the truck terminal in New York at the direction of agents who had a notice of inspection, the drums were found to contain a plastic bag of pills and were otherwise filled with cement and rock (Tr. 570-572). The drums were seized on April 4 (Tr. 607-609).

1. In his opening statement government counsel told the jury (Tr. 37):

> With regard to the conspiracy, with regard to the sales, we will place on the stand a man by the name of Jerry Miller. Jerry Miller will tell you sometime in July of 1966 he obtained certain information. As a result of this information he will tell you he made contact with the defendant John Kauffmann. He will further tell you that he had a conversation with John Kauffmann. He will tell you that the information he received from this conversation he turned over to the government, to government agents. He supplied them with the information, and you will learn from the evidence from that point on the government acted and the government gave Jerry Miller certain instructions upon which to act.

Miller was not, however, called to testify as a witness by either the prosecution or the defense. In the testimony of government witnesses reference was made to such matters as Miller's introduction of Kauffmann to the government agents, and Miller's presence at, and his arranging for, the time and place of

the various sales involved (*e.g.*, Tr. 48, 50-53, 55, 60, 80, 204, 216-217, 239, 259-260, 472-473, 521-522). The trial court sustained objections as to what Miller had said on such occasions (*e.g.*, Tr. 50, 63, 76). Cross-examination of government agents disclosed that they knew that Miller was an ex-convict with a previous felony conviction for possession of counterfeit plates, and that he was serving as a paid informant for the federal government (Tr. 116-118, 123, 126, 151-152, 499, 516-517). Both at the close of the government's case (Tr. 690) and at the close of all the evidence (Tr. 1106-1107), the court overruled co-defendant Kauffmann's request for a mistrial on the ground that the defense had been prejudiced by the government's failure to call Miller as a witness. In closing argument, counsel for both Kauffmann (Tr. 1162) and petitioner (Tr. 1201, 1213) commented upon the failure by the government to call Miller.

Petitioner contends that since government counsel in his opening statement indicated he would call the informant, Miller, as a witness, but later decided not to do so, petitioner was prejudicially deprived of his right to cross-examination of Miller under the confrontation clause of the Sixth Amendment (Pet. 16-17). This argument overlooks the fact that, while government witnesses mentioned acts by Miller, the trial court sustained objections to any statements allegedly made by him when referred to by other witnesses. The situation here is thus unlike that in *Pointer* v. *Texas*, 380 U.S. 400, and *Douglas* v. *Alabama*, 380 U.S. 415, where statements by absent wit-

nesses were used against the accused, and petitioner's reliance on those cases (Pet. 16-17) is misplaced.

In any event, the opening statement referred primarily to Miller's relationship with Kauffmann rather than with petitioner. Since Miller was available to both sides, no unfavorable inference could properly be drawn from the government's failure to call him. See *Wagner* v. *United States*, 264 F. 2d 524, 531 (C.A. 9), certiorari denied, 360 U.S. 936; *Johnson* v. *United States*, 291 F. 2d 150, 155 (C.A. 8), certiorari denied, 368 U.S. 880.

2. Testifying on his own behalf, petitioner denied any participation in the sales involved (Tr. 1080). In its final charge the court mentioned that petitioner had denied any participation in the transactions charged, his position being that "if he unknowingly committed any of the acts charged in Counts 2 through 11, inclusive, of the indictment, he did so as the result of the unlawful entrapment initiated and executed by the agents" (Tr. 1259-1260). Later the court instructed that both petitioner and co-defendant Kauffmann were asserting the defense of unlawful entrapment and pointed out the difference between unlawful and lawful entrapment (Tr. 1277-1278). The court concluded by instructing that if the defendants "or either of them, had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the government, then the defense of unlawful entrapment is a good defense, and the jury should acquit the said de-

fendants, John R. Kauffmann and/or Bernard J. Chubet, Jr., so entrapped" (Tr. 1278).

While the phrase "lawful entrapment" is hardly felicitous, the court's charge properly and adequately informed the jury of the essential nature of the defense of entrapment. Petitioner was allowed the benefit of this defense even though he denied participating in the criminal activity. Nothing in *Escobedo* v. *Illinois*, 378 U.S. 478, makes it mandatory that a criminal be warned of his privilege against self-incrimination and his right to counsel *before* he commits an intended crime (see Pet. 15-16).

3. With regard to the seizure of the drums, petitioner contends that 21 U.S.C. (Supp. IV) 372(e)(5), which permits an agent of the Bureau of Drug Abuse Control to "make, prior to the institution of libel proceedings under section 334(a)(2) of this title, seizures of drugs or containers or of equipment, punches, dies, plates, stones, labeling, or other things, if they are, or he has reasonable grounds to believe that they are, subject to seizure and condemnation under such section 334(a)(2)," violates the Fourth Amendment (Pet. 17-18). The court of appeals declined to reach the question since petitioner's sentences were supported by the substantive counts charging sale and possession before the date of seizure (Pet. App. 4-6). At all events, since the seizure is preliminary to an action for forfeiture and condemnation of drugs dangerous to health, Congress could, consonant with the Fourth Amendment's test of reasonableness, permit seizure without a warrant, based on a determination of probable cause.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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